UNITED STATES OF AMERICA v. **AHMED KHALFAN GHAILANI** a/k/a "Fupi", "Haytham", "Abubakar Khaflan Ahmed", "Sharif Omar"	**RULING ON D-006, DEFENSE MOTION to Compel Discovery** 16 April 2009

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1. Procedural History. On 27 March 2009, the Defense moved this Commission to issue an Order Compelling Discovery of certain matters from the Government. The Government responded in a timely manner to the Defense's motion on 8 April 2009. Thereafter, the Defense filed supplemental pleadings with the Commission on 13 April 2009. An R.M.C. 802 session was conducted on 13 April where this motion was further discussed. Neither party requested oral argument.

2. Issue. The Defense seeks an order from this Commission compelling the Government to produce current contact/ address information in their possession for certain named witnesses. The government has declined to provide this information. In the alternative, the Defense seeks dismissal of all charges and specifications now pending against the accused.

3. Facts.

a. As part of pre-trial discovery, the Government provided a binder containing information relative to the referral process in the subject case. Included within the referral binder were the statements recorded in 1998 of at least eleven witnesses.

b. On 20 March 2009 the Defense requested, via electronic mail, contact information for witnesses whose statements were disclosed in the referral binder. The Government declined to provide contact information as requested. Thereafter, on 25 March 2009, the Defense provided via electronic means, a list outlining specific names in concert with their prior request for contact information. The Government declined to provide contact information for the thirteen (13) named witnesses.

c. On 17 April 2009 a Defense team will travel to Kenya and Tanzania for pre-trial preparation over a two week period.

d. The statements of the various persons interviewed by United States and local police officials provide either telephone numbers, home addresses, business names and addresses, local police official who participated in the interview process. the name of the police station where interviews took place, identity and address of relative or telephone contacts of neighbors, post office boxes, neighborhoods/districts of residence and in some cases, directions to homes or businesses. Some statements provided more identifying information than others. The new report extract provides little amplifying information.

e. All statements considered under this motion were taken in 1998 in Tanzania.

4. Discussion.

a. Commissions in general are *sui generis* both in their form, procedure and substance. While it is accurate that the Commissions have adopted many principles common to trials by courts-martial, the overall charter of Military Commissions is one calculated and designed to provide the greatest degree of due process and justice consistent with supervening national security concerns, when applicable. Accordingly, Commissions must not only be fair and just, the Commission process must be perceived as such by all participants and those who view the application of justice via the Commission process. Accordingly, within this framework, precedent of military and federal circuits must be considered on the merits of the issues then presented. Oft times, those considerations mandate a melding of military and federal law.

b. In federal practice, discovery in criminal litigation is, in many respects, vastly different from that experienced in a military court. The Government correctly reveals the determination of the Supreme Court from Weatherford v Bursey that "there is no general constitutional right to discovery in a criminal case, and Brady did not create one". See also, Pennsylvania v Ritchie, 480 U.S. 39; 107 S. Ct. 989; 94 L. Ed. 2d 40 (1987). However, as it applies to discovery in a military

jurisdiction, the superior military court in United States v. Killebrew, 9 M.J. 154, 159 (C.M.A. 1980) stated,

> "Military law has long been more liberal than its civilian counterpart in disclosing the government's case to the accused and in granting discovery rights. For example, the names of prospective witnesses are listed on a charge sheet, which is served on the accused; in civil courts the names of prosecution witnesses often remain undisclosed."

c. The model for R.M.C. 701 extends from its military counterpart, R.C.M. 701 and its statutory basis, Article 46, U.C.M.J. The analysis of R.C.M. 701 provides additional guidance and illustration of the discovery rights which should be afforded in a military criminal court context. In this Commission's opinion, this analysis from the Manual for Courts-martial is persuasive authority. The rationale expressed therein demonstrates that the discovery rights in military trials should be interpreted more liberally than its federal counterpart (found in Federal Rules of Criminal Procedure 16)[1]. It is not unreasonable to conclude that a hybrid between federal practice and military criminal practice has been created. Accordingly, an accused enjoys greater and more liberal discovery rights at Military Commissions than a defendant indicted in a federal district court.

d. However, the analysis of the particular question presented here cannot conclude on this note. The question begged by the current controversy is whether the Government should be compelled to provide discovery in the form of updated contact information for certain persons interviewed in a foreign country over a decade ago. Moreover, the question is formed - has the Defense demonstrated by a preponderance that they are entitled to the relief requested. In brief, the answer to the latter question is in the negative.

e. The defense has not demonstrated that they have been denied access or "unreasonably impeded" by the Government's failure or denial to provide current contact information of certain individuals who were interviewed by

[1] I note that many portions of R.C.M. 701 are taken directly from Fed. R. Crim. Proc 16.

police officials over a decade ago[2]. The Defense has offered no evidence that the statements in their present form will prevent them from contacting and interviewing any person on their requested list. Additionally, there is no assertion that the Government has taken any action calculated to prevent the Defense from successfully conducting their own investigation. In fact, it appears that the Convening Authority has approved $60,000 for the Defense to conduct investigations in East Africa.

f. However, while the Defense has failed to carry their burden on this specific point at this time, future motions of the same nature may have different results. In addition to fundamental notions of justice, economy, efficiency, effectiveness, and productivity of the judicial process are at stake. While this Commission is sensitive to proceeding with all due dispatch with discovery and other pre-trial requirements, the government's failure to provide even basic discovery will compound and exacerbate the smcoth and forthright administration of this Commission[3].

5. Ruling. The Defense Motion to Compel Discovery in the form of updated contact information of various named witnesses is denied.

16 April 2009
Date

B. W. MacKenzie
Military Judge

[2] The Government has neither confirmed nor denied that they possess this information. One may infer from electronic communications between the Government and Defense that they do indeed hold current contact information of the potential witnesses. The language used is quoted from RMC 701(j).

[3] In rendering this decision, there has been no assertion that witnesses are under any protective regime for their personal safety by any police or political entity.

UNITED STATES OF AMERICA v. AHMED KHALFAN GHAILANI	**Defense Motion to Compel Discovery** 27 March 2009

1. Timeliness: This motion is timely filed in accordance with Rule 3 paragraph 6(b)(1) of the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007.

2. Relief Sought: The Defense respectfully requests that the military judge order the government to comply with its discovery obligations as set out by R.M.C. 701, or, if the Government is unwilling to meet its discovery obligations a complete dismissal of all the charges. The Defense further requests that the Military Judge order the Government to ***immediately*** provide the Defense with its most recent contact information for the persons requested in the Defense Request for Information on 25 March 2009.

3. Overview: In ruling on P-001 and granting the Government a continuance of 120 days, the Military Judge ordered that "pre-trial discovery will proceed with all due dispatch in accordance with the Rules of Court." That ruling was issued on 13 February 2009. As of the date of this motion, the Government has failed to make any efforts to continue discovery.

4. Burden and Standard of Proof: As the moving party, the Defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion. *See* R.M.C. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).

5. Facts: The Defense offers the following facts:

a. On 13 February 2009, the Military Judge ruled on P-001 and granted the Government's request for a 120-day continuance until 22 May 2009. In that order, the Military

Judge ordered that "pre-trial discovery will proceed with all due dispatch in accordance with the Rules of Court." The Military Judge also held in abeyance the Defense's prior Motion to Compel Discovery (D-002).

b. On 3 March 2009, the Defense submitted a Supplemental Discovery Request to the Government. The Government has yet to acknowledge or respond to that request. *See* Attachment A.

c. The Government has made absolutely no efforts to continue to meet its discovery obligations.

d. On 25 March 2009, the Defense requested that the Government provide current contact information for witnesses located in Tanzania and Kenya that had previously provided statements to the FBI. Within hours, the Government refused to provide the requested information. *See* Attachment B.

e. The Defense team intends to travel to Tanzania and Kenya to locate and interview witnesses from 17 – 30 April 2009.

6. Discussion:

a. *General Participation in Discovery*

R.M.C. 701(l)(1) grants the Military Judge the authority to regulate the time, place and manner of discovery. Pursuant to that authority, the Military Judge ordered the Government to complete discovery by 1 June 2009, but also ordered the Prosecution to continue "pre-trial discovery … with all due dispatch in accordance with the Rules of Court." The Prosecution has failed to meet that obligation. As the Defense has submitted in prior motions and submissions, it is apparent that the Prosecution fully intends to abuse the Military Judge's ruling on P-001 and the new trial schedule and to game the system to its advantage. The Military Judge set a new discovery complete date of 1 June 2009 in the Schedule for Trial issued on 4 March 2009. This

date is 10 days beyond the expiration of the 120-day continuance. It is apparent from the Prosecution's conduct that they intend to completely and flagrantly ignore the Military Judge's directive to continue pretrial discovery in this case and that they intend to abuse the small window in the Military Judge's separate rulings to gain what the Military Judge refused to grant them in the ruling on P-001, i.e., relief from a continuing discovery obligation during the continuance period.

The Defense requests that the Military Judge order the Prosecution to immediately resume its participation in the discovery process. If the Prosecution refuses or fails to do so, the Defense requests that the Military Judge dismiss all the charges.

b. *Information Concerning Witnesses*

The Prosecution has further shown its intent not to comply with the Military Judge's order by denying the Defense request for information on witnesses. The Defense request for information is reasonable and these are persons that the Defense is entitled to speak with prior to trial. R.M.C. 703(a) states that "[t]he defense shall have reasonable opportunity to obtain witnesses and other evidence." Additionally, R.M.C. 701(j) provides that "[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence. These are not random persons that the Defense asked the Government to find. These are persons whose statements appear in the referral binder, submitted by the Government to the Convening Authority to justify the charges. Certainly there is no argument that these witnesses are not relevant.

The Defense request is time-sensitive. Unlike the Prosecution, the Defense is laboring to abide by the both the letter and the spirit of the Military Judge's order granting the continuance by continuing to prepare for trial. To that end, the Defense team is travelling to Tanzania and

Kenya at the end of April. The Government, however, has chosen the path of obstructing the Defense in any effort to investigate and prepare its case by refusing to provide any current contact data on the persons whose statements were relied upon by the Convening Authority. Although Defense Counsel are making independent efforts to locate these persons, the Government should be aiding in this effort. Such aid is not beyond the ability of the Government.

The United States Government is spending approximately $60,000 for this trip. It seems nonsensical to make that trip less productive and efficient than possible simply so that the Government can attempt to gain some advantage by delaying defense counsel's interaction with these witnesses. Hiding witnesses for the Defense may be common practice of federal prosecutors, but it is a foreign concept to the military justice system and such practices should not be allowed in any military criminal justice system, whether courts-martial or military commissions. Simply put, these tactics represent nothing more than an attempt at litigation by surprise, harassment or some other illegitimate motive, all of which are inconsistent with the way we practice law in the United States military and should not be tolerated by this Commission.

The Defense requests that the Military Judge order the Prosecution to immediately provide the Defense with the most current contact information available for the requested witnesses.

The Defense reserves all future issues regarding the Prosecutions assertions as to whether any particular piece or type of information is discoverable or any other issue relating to discovery.

7. **Request for Oral Argument**: The Defense does not request oral argument. Should the Military Judge desire oral argument, the Defense is prepared to argue.

8. **Witnesses**: None.

9. **Conference with Opposing Counsel**: The Defense attempted to confer with the Prosecution on this motion but received no response and assumes, based on the response to request for information last week, that the Prosecution opposes the requested relief.

10. **Attachments:**

A. Defense Supplemental Discovery Request, dated 5 Mar 09

B. Defense Request for Information (e-mail) and Response, dated 23 Mar 09

C. Orders for Maj Richard Reiter showing dates of travel and estimated cost.

Respectfully submitted,

By: //signed electronically
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

ATTACHMENT (A)

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

5 Mar 09

MEMORANDUM FOR OMC OFFICE OF THE CHIEF PROSECUTOR
TRIAL COUNSEL: John McAdams

SUBJECT: Supplemental Discovery Request - *United States v. Ahmed Khalfan Ghailani*

FROM: Detailed Defense Counsel

References: (a) RMC 701
(b) Defense Discovery Request of 14 Oct 08

1. Pursuant to the references, the Defense hereby respectfully requests a full, unredacted copy of any and all statements made by [redacted] which mention Mr. Ghailani, the bombing of the United States Embassy in Dar Es Salaam, or that may be relevant to Mr. Ghailani's case in any manner. The Defense further requests all information in the possession of any United States government agency concerning each individual statement made by [redacted], *including but not limited to* the time, date and location of the statement, the names and current contact information of any and all persons involved in the interrogation, a full description of any and all interrogation techniques used to obtain the statement and any notes, photographs, recordings or other paper or electronic information created in relation to the statement.

2. Your prompt written response to this request is respectfully requested. Please feel free to contact me if you have any questions and/or concerns about this request. I can be reached at [redacted].

Respectfully submitted,

By: //electronically signed//
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

CERTIFICATE OF SERVICE

I hereby certify that I delivered the original of this discovery request on trial counsel on 5 Mar 2009 via e-mail.

//electronically signed//
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani

ATTACHMENT (B)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (C)

REDACTED FROM PUBLIC RELEASE

UNITED STATES OF AMERICA	)	**(D-006)**
	)	
	)	
	)	**Prosecution Response to Defense Motion to Compel Discovery**
	)	
v.	)	
	)	
	)	
AHMED KHALFAN GHAILANI a.k.a., "FUPI," "HAYTHAM," "ABUBAKAR KHALFAN AHMED," and "SHARIF OMAR"	)	
	)	
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	)	
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	)	
	)	**8 April 2009**

1. Timeliness. This response is filed in accordance with the timelines specified by Rule 3 6(b)(1) of the Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007.

2. Relief. The Prosecution respectfully requests that the Military Judge deny Defense Motion to Compel Discovery filed on 1 April 2009.

3. Overview. The Government submits that the Defense is not entitled to the names and addresses of witnesses (contact information). Neither R.M.C. 701 nor 703 requires the disclosure of such information as part of discovery. The Government further submits that it is complying with its discovery obligations as set forth by the Military Judge Order dated 4 March 2009.

4. Burden of proof. As the moving party, the Defense has the burden of persuasion on any factual issue the resolution of which is necessary to decide this motion. *See* R.M.C. 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).

5. Facts. On 20 January 2009, President Barack Obama took office as President of the United States. As such, President Obama is the Commander-in-Chief of the United States Armed Forces. The Honorable Robert Gates continues to serve as the Secretary of Defense.

On 22 January 2009, President Obama issued an Executive Order (EO) entitled: REVIEW AND DISPOSITION OF INDIVIDUALS DETAINED AT THE GUANTANAMO BAY NAVAL BASE AND CLOSURE OF DETENTION FACILITIES. This Executive Order ordered an inter-agency Review of "the status of each individual currently detained at Guantanamo" and directed the Secretary of Defense to "ensure that during the pendency of the Review … no charges are sworn or referred to a military commission … and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered … are halted."

The Review is to determine "whether it is possible to transfer or release [] individuals consistent with the national security and foreign policy interests of the United States" who are currently detained at Guantanamo. The cases of those "individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution …."

By order of the President, the Secretary of Defense directed the Chief Prosecutor of the Office of Military Commissions to seek continuances of 120 days in any case that had been referred to military commission, in order to provide the Administration sufficient time to conduct a Review of detainees currently held at Guantanamo Bay, Cuba.

On 23 January 2009, the Prosecution filed its Motion for a 120-Day Continuance in the Interests of Justice. On 13 February 2009, the Military Judge granted the Government's motion for a continuance until 22 May 2009. The Order also stated that "pre-trial discovery will proceed with all due dispatch **in accordance with the Rules of Court**." (Ruling on Government Motion for Continuance, page 2.) (Emphasis added.)

On 4 March 2009, pursuant to its 13 February 2009 Order granting the Government's motion for a 120-day continuance, the Military Judge issued its "Schedule for Trial Amendment ONE," setting forth 1 June 2009 as the "Discovery completed" date.[1]

6. <u>Discussion</u>. The discussion which follows shall address the issues in the order raised by the Defense in its Discussion section of its motion.

a. *<u>General Participation in Discovery</u>*

The Defense asserts that the "Military Judge ordered the Government to complete discovery by 1 June 2009, but also ordered the Prosecution to continue 'pre-trial discovery … with all due dispatch in accordance with the Rules of the Court,'" and by not providing discovery, the "Prosecution has failed to meet its obligation." (Defense Motion to Compel Discovery at 2)

[1] The actual order of events is contrary to the Defense's assertion that "the Military Judge ordered the Government to complete discovery by 1 June 2009, but also ordered the prosecution to continue 'pre-trial discovery … with all due dispatch in accordance with the Rules of the Court.'" (Defense Motion to Compel Discovery, page 2.)

(quoting Military Judge's Ruling on Government Motion for Continuance of 13 February 2009 at 2). The Defense also alleges that the Government is "completely and flagrantly ignor[ing] the Military Judge's directive" with respect to discovery and "abus[ing] the small window in the Military Judge's separate rulings" with respect to discovery. (Defense Motion to Compel Discovery at 3.)

The Government submits that the Defense assertion is strained at best, and based upon a disingenuous recitation of the sequence of the orders of this Commission. Contrary to what the Defense would want this Commission to believe, the Military Judge **first** ordered on 13 February 2009 that "pre-trial discovery [continue] with all due dispatch in accordance with the Rules of Court," and **subsequently** set forth the "Rules of the Court" with respect to discovery in its 4 March 2009 "Schedule for Trial Amendment ONE," which established 1 June 2009 as the "Discovery completed" date. The Prosecution is in full compliance with the orders of this Commission with respect to its discovery obligations, and until such time as it is not, Defense counsel should refrain from gratuitous hyperbole.

To reiterate, to date, over 10,000 pages of electronic discovery have been provided to the Defense. As stated previously on a number of occasions (*See* Government's Proposed Amended Trial Schedule dated 27 February 2009), the Government will continue to provide any discovery it is able to provide as soon as it is able to provide it, and will strive to complete discovery even before the 1 June 2009 date, if that becomes possible.

b. *Information Concerning Witnesses*

The Defense asserts that R.M.C. 703(a) requires the Government to disclose names and addresses of witnesses in order to speak with them. The Government submits that the Defense reliance on 703(a) is misplaced. When read in its entirety, it is evident that R.M.C. 703, which is entitled "Production of witnesses and evidence," establishes a statutory right of production and presence of relevant and necessary witnesses to **testify** either at an interlocutory hearing, trial or sentencing, rather than a pretrial discovery right. For example, R.M.C. 703(a) refers to the Defense's opportunity "to **obtain** witnesses and other evidence …" (Emphasis added.) R.M.C. 703 (b), "Right to Witnesses," speaks of such right either "On the merits or on interlocutory questions," 703(b)(1), "On sentencing," R.M.C. 703(b)(2), or "Unavailable witness" R.M.C. 703(b)(3).

R.M.C. 703(b)(3)(B) refers to the **testimony** of an unavailable witness. R.M.C. 703(c) deals with the **production** and necessary contents of a request for production of "relevant and necessary" witnesses "on the merits or interlocutory questions," or sentencing. 703(e) sets forth the procedures for **production** of witnesses, military and civilian.

In sum, the Government submits that R.M.C. 703, read in its entirety, is not a pretrial discovery right to witness contact information.

The Defense also asserts that R.M.C. 701 requires disclosure of witness contact information. The Government respectfully submits that the rule does not require Government disclosure of names and addresses of witnesses as part of pretrial discovery.

The Government is aware that it must "[b]efore the beginning of trial on the merits [] notify the defense of the names of the witnesses the trial counsel intends to call: (A) [i]n the prosecution case-in-chief; and (B) to rebut a defense of alibi or lack of mental responsibility, when trial counsel has received notice under this rule." R.M.C. 701(b)(2). However, it is important to note that this requirement is limited to witnesses the prosecution intends to call in its case-in chief, or to witnesses to rebut an alibi or lack of mental responsibility. It is interesting to note that in all of Rule 701, it is only in those limited instances set forth in 701(b)(2) that trial counsel is required to provide any identifying information about witnesses.

The Defense cites R.M.C. 701(j) in support for its request. However, the Government disagrees with the Defense that 701(j) requires disclosure of contact information of individuals the Defense wishes to interview. The Government submits that a refusal to disclose information that is not discoverable is not a violation of Rule 701(j). Such action does not "unreasonably impede access of [the Defense] to a witness or evidence." The rules of discovery would be rendered a nullity if otherwise non-discoverable information would be required to be disclosed pursuant to the assertion that such proper non-disclosure unreasonably impedes access of another party to a witness or evidence.

The Defense attempts to heighten the significance of its request by referencing its anticipated travel to Tanzania and Kenya at the approximate cost of $60,000.00. The Defense asserts that "[i]t seems nonsensical to make the trip less productive and efficient than possible simply so that the Government can attempt to gain some advantage by delaying counsel's interaction with these witnesses." (Defense Motion at 4.)

The Government shares and applauds the Defense's concern for productivity and efficiency, especially when it involves the expenditure of $60,000.00 of United States Government money. However, the Government notes that it would be the height of inefficiency and profligate expenditure of Government monies if the trip is taken prior to the completion of the inter-agency review of this matter. As noted above, the ordered Review is to determine "whether it is possible to transfer or release [] individuals consistent with the national security and foreign policy interests of the United States" who are currently detained at Guantanamo. The cases of those "individuals detained at Guantanamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution …"

The alternatives described above could either render moot the necessity for the Defense to take such a trip if the accused is transferred or released, or prosecuted in an Art. III court, or rendered inefficient and unproductive if the accused remains in the military commission process and the laws and the rules of procedure in such process change significantly.

The Defense asserts that "[h]iding witnesses for [sic] the Defense may be common practice of federal prosecutors …" Such a baseless characterization of federal law and practice, and accusation against federal prosecutors, betrays a profound inexperience and unfamiliarity of federal criminal law. In a federal prosecution, a defendant in a noncapital case has no constitutional right to discover the identity of prospective government witnesses. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (no due process requirement exists to provide names of witnesses unfavorable to defendant); *see, e.g., United States v. Collazo-Aponte*, 216 F.3d 163, 182 (1st Cir. 2000) (no constitutional or statutory right pursuant to Fed. R. Crim. Pro. 16[2] to disclosure of identities of prosecution witnesses), *vacated on other grounds*, 532 U.S. 1036 (2001); *United States v. Pearson*, 340 F.3d 459, 468 (7th Cir. 2003) (no constitutional or statutory right to disclosure of prospective government witnesses in noncapital cases), *vacated on other grounds sub nom. Hawkins v. United States*, 543 U.S. 1097 (2005); *United States v. Sandoval-Rodriguez*, 452 F.3d 984, 990 (8th Cir. 2006) (no right to disclosure of government's witnesses in noncapital cases).

The fact that Rule 16 does not compel disclosure of names and addresses of government witnesses does not mean that a federal defendant is necessarily precluded from such information. The granting of a request for pre-trial disclosure of the identities of the government's witnesses is within the discretion of the court. *United States v. John Bernard Industries Inc.*, 589 F.2d 1353, 1358 (8th Cir. 1979); *United States v. Harris*, 542 F.2d 1283, 1291 (7th Cir. 1976); *United States v. Cannone*, 528 F.2d 296, 299 (2d Cir. 1975).

To obtain a government witness list, a defendant must make a specific showing that such a disclosure is both material to the preparation of the defense and reasonable in light of the circumstances. A defense request for disclosure of a witness list on the ground of a general need to prepare for cross-examination does not constitute a showing of necessity. *United States v. Sclamo*, 578 F.2d 888, 890 (1st Cir. 1978). Where the government has made a motion for a protective order, representing that disclosure of witness information would involve potential danger to witnesses, a trial court does not abuse its discretion by refusing to order disclosure of witness information. *Harris*, 542 F.2d at 1291.

7. **Oral Argument**. The Prosecution does not request oral argument.

8. **Witnesses**. None.

[2] Rule 16 of the Fed. R. Crim. Pro. is the main federal rule which governs discovery, and it does not mandate disclosure of names of witnesses. Attempts to amend Rule 16 to compel such disclosure by either the prosecution or defense have been rejected by Congress. H.R. Conf. Rep. No. 414, 94th Cong., 1st Sess. 12 (1975). The conference report accompanying the 1975 amendments to the Rules of Criminal Procedure notes: "A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formation of this policy."

9. Certificate of Conference. A conference with the Defense regarding this response is not required. *See* Military Commissions Trial Judiciary Rules of Court, issued on 2 November 2007, Form 3-2 Format for a Response.

10. Additional Information. None.

11. Attachments. None.

12. Submitted by:

_____
Felice John Viti
Prosecutor

_____
John McAdams
Prosecutor

_____
Jeffrey B. Jones
Prosecutor

UNITED STATES OF AMERICA

v.

AHMED KHALFAN GHAILANI

D-006

Defense Reply to Prosecution Response to Defense Motion to Compel Discovery

13 April 2009

1. **Timeliness**: This response is timely filed in accordance with the Military Commissions Trial Judiciary Rules of Court issued on 2 November 2007.

2. **Reply**:

a. General Participation in Discovery

The Government argues that by allowing approximately one week between the end of the continuance period and the discovery completed date, this Commission has intentionally excused it from participation in discovery during the continuance period. The Government knows full well that this was not the Military Judge's intent and is vastly inconsistent with both the letter and spirit of the Military Judge's orders. At the 13 February 2009 R.M.C. 802 conference where the Military Judge verbally granted the Government's continuance request, the Military Judge made exorbitantly and unmistakably clear his intent that all pretrial preparations continue as if no continuance had been granted and that the continuance was granted only as it applied to formal, on-the-record hearings held at Guantanamo Bay.

Furthermore, the Schedule for Trial, Amendment ONE, dated 4 March 2009, relied upon by the Government to support its dubious assertions belies the Government's argument. The order sets the "Discovery completed" date as 1 June 2009 and the due date for discovery motions as 15 June 2009. There is no logical way the Military Judge intended for the Government to dump tens of thousands of pages of discovery on the Defense between 23 May and 1 June and subsequently for the Defense to be able to process this information and file discovery motions in

a matter of 14 days. Rather, it reflects the Military Judge's direction and vision that the pretrial preparations, including discovery, would continue during the period of delay. This is further confirmed by the Military Judge's own words in his ruling on the continuance request, where he stated "This Ruling is based exclusively upon this Commission's belief that no prejudice will inure to the detriment of the accused based upon the current trial schedule and the continued progression of pre-trial discovery."

The Government's interpretation of these orders is completely and totally logically inconsistent with every direction from the Military Judge and their argument is without merit. The Defense's prior assertion that the Government is abusing the small window of opportunity provided in the orders is not gratuitous hyperbole, but rather clearly an accurate statement of fact.

b. Information Concerning Witnesses

The Government's arguments concerning provision of contact information for the potential witnesses are also demonstrably without merit. The best place to start is to clarify exactly what the Defense has requested. Although the Government asserts that the Defense has requested a "witness list" and makes varying irrelevant legal arguments about the Defense's entitlement to such a list, the Defense has simply asked for the most recent contact information known to the Government for a list of persons who could potentially be witnesses for either the Government or the Defense at trial. It is also important to note, these are not random people identified by the Defense; they are persons possessing information of sufficient importance that the Government felt it necessary to include their statements in the "Referral Binder" forwarded to the Convening Authority for her consideration in making her referral decision.

R.M.C. 703's right to obtain witnesses and evidence is a meaningful right granted to the accused by the MCA. The Government argues that this rule is designed simply for the production of witnesses at the trial. While on its face this may appear to be an appealing reading of the rule, the Government's approach is illogical. It would be impossible for the Defense to

intelligently and meaningfully exercise this right without the ability to properly investigate and prepare its case, including interviewing potential witnesses. The Government should not be allowed to hamper the Defense's ability to exercise this right by withholding information on how to contact these persons for no legitimate purpose other than to make the Defense's investigation and preparation more difficult.

The Government's irrelevant discussion of Federal Rule of Criminal Procedure 16 and access to Government witness lists in federal practice demonstrates a profound unfamiliarity with military practice, upon which the Military Commission system is based. It is fundamental to the military justice system that the Defense has equal access to witnesses and evidence and military prosecutors routinely provide current contact information for any potential witnesses, especially any witness whose statement was relied upon by the Convening Authority in making the referral decision. *See* Article 46, UCMJ. Although the accused in a Military Commission enjoys less than equal access, Section 949j(a) of the MCA at least provides reasonable access to the witnesses and evidence. The Defense has not asked the Government to produce, locate, find, or set up interviews of these potential witnesses. The Defense has simply asked for the most recent contact information known to the Government so that we may seek these individuals out on our own and attempt to interview them.

Finally, the Government's arguments concerning the inter-agency review process is disingenuous at best. The Secretary of Defense's order implementing the Executive Order clearly states "This order does not preclude continued investigation and evaluation of cases by the OMC," of which OMC-D is a part. The Military Judge's continuance order, in both its verbal and written forms, directed that the parties continue to prepare for trial. The Defense is endeavoring to fulfill the spirit and intent of these orders. The prosecution may be content to sit on their hands and do nothing, but the Defense is not. As long as Mr. Ghailani is pending charges, for which imprisonment for the rest of his life is a possibility, the Defense has a legal and ethical obligation to zealously prepare for trial.

Furthermore, the Government's suggestion that the inter-agency review process may negate the need for the Defense's pending trip is factually unsupportable. First, any suggestion by the Government that the United States Government may release Mr. Ghailani is nothing short of laughable. This is the same Government that less than one year ago sought a referral decision that would allow it to execute Mr. Ghailani. *See* Attachment A.

Second, current Defense counsel have an established and enduring attorney-client relationship with Mr. Ghailani that will likely continue to exist regardless of the outcome of the Government's current forum-shopping endeavor. Mr. Ghailani has a right to have his Defense team continue to prepare so that when the Government decides to get this case moving again, his counsel are ready to proceed without further delay. Following nearly five years of incarceration by the U.S. Government with no opportunity to respond to the indictment against him, Mr. Ghailani is at least entitled to an efficient and expeditious process now.

Third, regardless of the forum, the counsel involved, or whether the rules change significantly, the persons identified possess important ***factual*** information and are going to be crucial figures in the proceedings going forward. See Attachments B-M. Defense counsel interviewing these witnesses and efficiently utilizing the time during the continuance period and endeavoring to be prepared to proceed in any forum can hardly be defined as "the height of inefficiency and profligate expenditure of government monies." It is, rather, responsible, ethical and zealous representation of our client.

If the Government wished to halt the Defense preparations, it could have simply dismissed the charges with prejudice. Instead, the Government has attempted to create a situation where it gets to have its cake and eat it too – a situation where it gets to keep open all of its various options in its forum-shopping enterprise, while simultaneously intentionally hindering the proper preparation of the Defense by discontinuing any participation in the discovery process. The Defense requests that

the Military Judge immediately remedy this injustice by either ordering the Government to fulfill its obligations or by dismissing these charges with prejudice.

3. Attachments:

A. Legal Advisor's Pretrial Advice of 30 Sep 2008

B. FBI Statements of [redacted]

C. FBI Statements of [redacted]

D. FBI Statements of [redacted]

E. FBI Statements of [redacted]

F. FBI Statements of [redacted]

G. FBI Statements of [redacted]

H. FBI Statements of [redacted]

I. FBI Statements of [redacted]

J. FBI Statements of [redacted]

K. FBI Statements of [redacted]

L. FBI Statement of [redacted]

M. Newspaper Articles re: [redacted]

Respectfully submitted,

By: //signed electronically
LTCOL J.P. COLWELL, USMC
MAJ R.B. REITER, USAFR
Detailed Defense Counsels for
Ahmed Khalfan Ghailani
Office of the Chief Defense Counsel
Office of Military Commissions
1600 Defense Pentagon, Room 3B688
Washington, DC 20301

ATTACHMENT (A)

UNITED STATES OF AMERICA v. AHMED KHALFAN GHAILANI a.k.a. Fupi, a.k.a. Haytham, a.k.a. Abubakar Khalfan Ahmed, a.k.a. Sharif Omar	**LEGAL ADVISOR'S PRETRIAL ADVICE** SEP 30 2008

Pursuant to the Military Commissions Act of 2006 (M.C.A.), and the Manual for Military Commissions of 2007 (M.M.C.), the Chief Prosecutor forwarded the attached charges against Ahmed Khalfan Ghailani. Originally, the charges were sworn in accordance with Rule for Military Commissions (R.M.C.) 307 on March 28, 2008. The charges were subsequently resworn on June 18, 2008, and forwarded to the Office of the Convening Authority on July 10, 2008. The prosecution recommends that the charges be tried by a military commission authorized to impose the death penalty.

R.M.C. 401 authorizes only the Secretary of Defense or a convening authority designated by him to dispose of charges. As a convening authority designated by the Secretary of Defense for the purpose of convening military commissions, you have the authority to dismiss the charges or refer them to a trial by military commission. 10 U.S.C. § 948h.

R.M.C. 406 requires that I advise you on certain matters before you may refer any charge or specification to trial by a military commission. After examining the charge sheet dated June 18, 2008, the allied papers, supporting evidence, and the letter from Defense Counsel dated May 1, 2008, I conclude as follows:

a. With respect to whether each specification alleges an offense under the M.C.A.

The Specification of Charge I, Conspiracy, alleges Mr. Ghailani "did … conspire and agree" with various individuals in the al Qaeda network and did "willfully join an enterprise of persons with the intent to further the unlawful purpose of the enterprise, said agreement and enterprise sharing a common criminal purpose …" The "enterprise of persons" and "common criminal purpose" language is known colloquially as Joint Criminal Enterprise (JCE). The elements of proof for Conspiracy, including JCE, are expressed in the Manual for Military Commissions at Part IV, §6(a)(28)(b). The elements read as follows:

(1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in

part, the commission or intended commission of one or more substantive offenses triable by military commission;

(2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose; and

(3) The accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

In three commission trials, the defense has successfully challenged the authority of the Secretary of Defense to promulgate elements of proof not contemplated by the M.C.A. *See U.S. v. Khadr*, Ruling on D-19, Defense Motion to Strike Surplus Language from Charge III, (April 4, 2008); *U.S. v. Hamdan*, Ruling on D-22, Defense Motion to Dismiss Conspiracy, (June 1, 2008); *U.S. v. al Darbi*, Ruling on D-6, Defense Motion to Dismiss "Criminal Enterprise" from Specification of Charge I, (August 8, 2008).

The military judges' rejection of this form of charging has not affected the agreement, or "classic" conspiracy language as articulated in the M.C.A. and the M.M.C. I conclude that the Specification of Charge I, Conspiracy, states an offense under the M.C.A., 10 U.S.C. § 950v(b)(28), but the language alleging the accused's involvement in a joint criminal enterprise should be deleted.

The Specification of Charge II, Murder of Protected Persons, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(1).

The Specification of Charge III, Murder in Violation of the Law of War, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(15).

The specifications of Charge IV, Attempted Murder of Protected Persons and Attempted Murder in Violation of the Law of War, as drafted, fail to allege an offense under the M.C.A., 10 U.S.C. § 950t, 10 U.S.C. § 950v(b)(1) and § 950v(b)(15) as they do not identify who Mr. Ghailani attempted to kill.

The Specification of Charge V, Attacking Civilians, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(2).

The Specification of Charge VI, Attacking Civilian Objects, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(3).

The Specification of Charge VII, Intentionally Causing Serious Bodily Injury, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(13).

The Specification of Charge VIII, Destruction of Property in Violation of the Law of War, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(16).

The Specification of Charge IX, Terrorism, alleges an offense under the M.C.A., 10 U.S.C. § 950v(b)(24).

The specifications of Charge X, Providing Material Support to Terrorism, allege offenses under the M.C.A., 10 U.S.C. § 950v(b)(25).

b. With respect to whether the allegation of each offense is warranted by the evidence.

I considered the information contained in the referral notebook and offer the following conclusions as to whether the allegations of each offense are warranted by the evidence.

The allegations in the Specification of Charge I, Conspiracy, 10 U.S.C. § 950v(b)(28), are warranted by the evidence.

The allegations in the Specification of Charge II, Murder of Protected Persons, 10 U.S.C. § 950v(b)(1) are warranted by the evidence.

The allegations in the Specification of Charge III, Murder in Violation of the Law of War, 10 U.S.C. § 950v(b)(15) are warranted by the evidence.

The allegations in the specifications of Charge IV, Attempted Murder of Protected Persons and Attempted Murder in Violation of the Law of War, 10 U.S.C. § 950t, 10 U.S.C. § 950v(b)(1) and § 950v(b)(15), would be warranted by the evidence if the victim class were properly alleged.

The allegations in the Specification of Charge V, Attacking Civilians, 10 U.S.C. § 950v(b)(2) are warranted by the evidence.

The allegations in the Specification of Charge VI, Attacking Civilian Objects, 10 U.S.C. § 950v(b)(3) are warranted by the evidence.

The allegations in the Specification of Charge VII, Intentionally Causing Serious Bodily Injury, 10 U.S.C. § 950v(b)(13) are warranted by the evidence.

The allegations in the Specification of Charge VIII, Destruction of Property in Violation of the Law of War, 10 U.S.C. § 950v(b)(16) are warranted by the evidence.

The allegations in the Specification of Charge IX, Terrorism, 10 U.S.C. § 950v(b)(24) are warranted by the evidence.

The allegations in the specifications of Charge X, Providing Material Support to Terrorism, 10 U.S.C. § 950v(b)(25) are warranted by the evidence.

c. With respect to whether a military commission would have jurisdiction over the accused and the offense.

The President is authorized to establish military commissions. 10 U.S.C. § 948b(b). By executive order on February 14, 2007, the President established military commissions to try alien unlawful enemy combatants for offenses triable by military commission as provided in chapter 47A of title 10. Military commissions may try any offense under the M.C.A. or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. 10 U.S.C. § 948d(a); R.M.C. 203.

Personal Jurisdiction

Under the M.C.A., 10 U.S.C. § 948c, military commissions have jurisdiction over alien unlawful enemy combatants. The evidence provided by the Chief Prosecutor is sufficient to prove that Ghailani, a citizen of Tanzania, is an alien. The M.C.A. defines an alien unlawful enemy combatant as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)." 10 U.S.C. § 948a(1)(A)(i). Sworn charges that allege a person is an "alien unlawful enemy combatant subject to trial by military commission" create a *prima facie* case for personal jurisdiction. *United States v. Khadr*, C.M.C.R. 07-001 (2007). If the accused moves to dismiss the charges for lack of personal jurisdiction, the military judge may hear evidence to determine if the accused meets the definition of an alien unlawful enemy combatant. I conclude that Ghailani's charges create a *prima facie* case for personal jurisdiction.

Subject Matter Jurisdiction

A military commission has subject matter jurisdiction "to try any offense made punishable by this chapter or the law of war when committed . . . before, on, or after September 11, 2001." 10 U.S.C. § 948d(a). Ghailani is charged with Conspiracy to commit offenses triable by military commission, Murder of Protected Persons, Murder in Violation of the Law of War, Attempted Murder of Protected Persons and Attempted Murder in Violation of the Law of War, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Destruction of Property in Violation of the Law of War, Terrorism, and Providing Material Support to Terrorism. Each of these offenses is made punishable under chapter 47A of title 10. Additionally, the attack is perpetrated against civilians, which offends principles of distinction and proportionality, thus violating the law of war. Therefore, I conclude that a military commission has subject matter jurisdiction over Ghailani.

d. With respect to whether trial of the charges would be harmful to national security.

Based on consultation with the Office of the Director of National Intelligence and appropriate intelligence agencies, I conclude that trial of the charges would not be harmful to national security.

e. Capital Referral

Under Part IV of the Manual for Military Commissions, death is an authorized punishment for the following charged offenses when death results and when properly plead: Conspiracy, Murder of Protected Persons, Attacking Civilians, Murder in Violation of the Law of War, and Terrorism. The Chief Prosecutor recommends that the charges be referred to a military commission empowered to adjudge the death penalty. By letter dated May 1, 2008, the Defense Counsel, Office of Military Commissions, asks that you consider several factors that he believes weigh against a capital referral, including, but not limited to, public comment from victim families opposing a sentence of death, the trial of equally culpable co-defendants in the United States District Court for the Southern District of New York and the perception that military commissions do not provide due process of law.

The prosecution intends to rely on the following aggravating factors from R.M.C. 1004(c) to pursue a death sentence:

(1) That the accused was convicted of an offense, referred as capital, that is a violation of the law of war;

(2) That the offense resulted in the death of one or more than one persons;

(3) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered;

(4) That the accused has been found guilty in the same case of another capital crime;

(5) That a victim was a protected person or that the offense was committed in such a way or under circumstances that the life of one or more protected persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of the offense of Murder of Protected Persons;

(6) That the offense was committed through the employment of a weapon that causes unnecessary suffering in violation of the law of war;

(7) That the offense was committed with the intent to intimidate or terrorize a civilian population, except that this factor shall not apply to a violation of the offense of Terrorism; and,

(8) That the offense was committed while the accused intentionally targeted a protected place.

The available evidence supports the application of all of the aggravating factors except (6). Considering the magnitude of the offenses, the loss of human life, the impact on the United States and Tanzania, and these aggravating factors, I recommend the case be referred as capital.

f. Recommendation of the action to be taken by the convening authority.

For the reasons stated above I recommend that:

(1) For the Charges and Specifications dated June 18, 2008, with regard to the Specification of Charge I,

a. You strike the words "and willfully join an enterprise of persons with the intent to further the unlawful purpose of the enterprise, said agreement and enterprise sharing a common criminal purpose known to the accused"
b. You strike the period after the words "11 persons."
c. You strike the period after the word "bombing."
d. You add a semi-colon after the parenthetical and then add the words "and that the accused knew the unlawful purpose of the agreement and joined willfully, that is, with the intent to further the unlawful purpose."
e. You strike the words "and enterprise"
f. You strike the words "or enterprise";

(2) For the Charges and Specifications dated June 18, 2008, you dismiss both Specifications of Charge IV and Charge IV, Attempted Murder, without prejudice and renumber the remaining Charges accordingly;

(3) For the remaining Charges and Specifications dated June 18, 2008, you refer the Charges and Specifications to trial by military commission convened by Military Commission Convening Order (M.C.C.O.) 08-01 dated 10 April 2008 to be tried as capital; and

(4) You dismiss the Charges and Specifications dated March 28, 2008.

Michael C. Chapman
Legal Advisor to the Convening Authority
for Military Commissions

Attachments
(1) Three referral binders
(2) Prosecution transmittal letter
(3) Letter from Defense Counsel dated 1 May 2008

DIRECTION OF THE CONVENING AUTHORITY

For the Charges and Specifications dated June 18, 2008, Specification of Charge I,

a. Strike the words "and willfully join an enterprise of persons with the intent to further the unlawful purpose of the enterprise, said agreement and enterprise sharing a common criminal purpose known to the accused";
b. Strike the period after the words "11 persons";
c. Strike the period after the word "bombing";
d. Insert a semi-colon after the parenthetical and insert the words "and that the accused knew the unlawful purpose of the agreement and joined willfully, that is, with the intent to further the unlawful purpose";
e. Strike the words "and enterprise"; and
f. Strike the words "or enterprise";

For the Charges and Specifications dated June 18, 2008, both Specifications of Charge IV and Charge IV, Attempted Murder, are dismissed without prejudice and the remaining Charges are renumbered accordingly;

The Charges and Specifications dated June 18, 2008, as amended, are referred to trial by military commission convened by Military Commission Convening Order (M.C.C.O.) 07-01, dated 1 March 2007, as amended by M.C.C.O. 07-05, dated 29 May 2007, to be tried as non-capital; and

The Charges and Specifications dated March 28, 2008, are dismissed.

3 Oct. '08

Susan J. Crawford
Convening Authority
Office of Military Commissions

ATTACHMENT (B)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (C)

ATTACHMENT (D)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (E)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (F)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (G)

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ATTACHMENT (H)

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ATTACHMENT (I)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (J)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (K)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (L)

REDACTED FROM PUBLIC RELEASE

ATTACHMENT (M)

REDACTED FROM PUBLIC RELEASE